

DAVID E. BROWN CONSTRUCTION,)	AGBCA No. 2006-102-3
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Appellant)	
)	
Representing the Appellant:)	
)	
David E. Brown, Owner)	
11810 Rd. 228)	
Chillicothe, Missouri 64601)	
)	
Representing the Government:)	
)	
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OPINION OF THE BOARD OF CONTRACT APPEALS

May 1, 2006

Before POLLACK and VERGILIO, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On October 17, 2005, the Board received a notice of appeal from David E. Brown Construction of Chillicothe, Missouri (contractor). The respondent is the U. S. Department of Agriculture (USDA or Government). The dispute involves a fixed-price contract, No. 50-6424-4-084, for the Moniteau Creek watershed project, issued and administered by the Natural Resources Conservation Service of the USDA. The contract calls for the construction of a floodwater retarding structure in Howard County, Missouri. The contracting officer denied the claim of the contractor seeking reimbursement of \$1,501, its alleged cost of alternative payment protection, for which it utilized a payment bond.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. By letter dated November 20, 2005, the contractor reduced to writing its election to utilize accelerated procedures. 41 U.S.C. § 607(f); Rule 12.3. The parties opted to submit the case pursuant to Board Rule 11, without a hearing. The evidentiary record is the appeal file; each party has submitted a brief.

The contract states that a payment bond is not required. The Alternative Payment Protections clause of the contract specifies that the contractor is obligated to submit payment protection in one of three forms: a payment bond, cashier's check, or an irrevocable letter of credit. The contractor opted to utilize a payment bond to meet its payment protection obligation, rather than either of the alternatives. The contract is not ambiguous. The Government did not alter the terms and conditions of the contract by requiring the contractor to submit some form of payment protection. Further, the contractor knew the interpretation of the contract prior to bidding and, despite claiming a mistake regarding the bonding cost, it opted to perform at the stated price. The contractor is not entitled to relief for satisfying the contract provision.

The Board denies the appeal.

FINDINGS OF FACT

1. The Government issued a solicitation to obtain bids on a firm, fixed-price basis for construction of a floodwater retarding structure. The solicitation identifies the price range as between \$25,000 and \$100,000. (Exhibit B at 11, 13) (all exhibits are in the appeal file.)

2. Paragraph 12A of the solicitation indicates, by the mark in the "no" box, that performance and payment bonds are not required:

THE CONTRACTOR MUST FURNISH ANY REQUIRED PERFORMANCE AND
PAYMENT BONDS? (If "YES" indicate within how many calendar days after
award in Item 12B.

☐ YES ☒ NO

(Exhibit B at 12.) Paragraph 12B is blank (Exhibit B at 12).

3. The solicitation and contract specifies additional requirements in paragraph 13. One such requirement states: "All offers are subject to the (1) work requirements, and (2) other provisions and clauses incorporated in the solicitation in full text or by reference." (Exhibit B at 12.)

4. The solicitation contains the Alternative Payment Protections clause (JUL 2000) (48 CFR 52.228-13), completed, with blanks filled in for the acceptable types of protection in paragraph (a) and the number of days in paragraph (c). The clause states in pertinent part:

(a) The Contractor shall submit one of the following payment
protections:

A Payment Bond

Cashier's Check

An Irrevocable Letter of Credit (ILC)

- (b) The amount of the payment protection shall be 100 percent of the contract price.
- (c) The submission of the payment protection is required within 5 days of contract award.

(Exhibit B at 43 (¶ I.4).) Regulation makes this clause mandatory for the solicitation and contract. 48 CFR 28.102-3(b) (2003).

5. By a letter dated September 14, 2004, after bid opening, but prior to contract award, in response to a Government request for price verification, Mr. Brown noted two apparent mistakes in formulating the bid price. He indicates that prior to bidding, he had viewed the site, “learned that a payment bond was required,” and had discussed the payment bond with his bonding agent; however, in finalizing the bid he had: (1) failed to include a price for a payment bond, and (2) not increased his bid price to account for additional site preparation. (Exhibit C at 145.) In a letter dated September 15, 2004, Mr. Brown provided additional information to the contracting officer, stating in part: “My discussion with the bonding company for a payment bond in the \$60,000.00 range should help to prove my intent since the requirement for a bond of any type is marked (NO) in the solicitation. I did not learn of the requirement for a payment bond till the day of the site showing.” (Exhibit C at 151.) After bid opening, but prior to award, he was given the option of withdrawing the bid or maintaining the bid as submitted. He responded: “I wish to maintain my bid for \$53,253.30 as originally submitted.” (Exhibit C at 156.)

6. On September 23, 2004, the Government entered into a fixed-price contract, in the amount of \$53,253.30, with the contractor. The contract includes the terms and provisions of the solicitation, including those identified in the above findings of fact. (Exhibit B.)

7. After award, the Government did not require the contractor to submit a payment bond. With the written notice of award, the Government specified:

Pursuant to Section I.4, 52.228-13, payment protection, in the form of a payment bond, cashier’s check or irrevocable letter of credit must be submitted within **5 calendar days** after receipt of this letter, to me at the address above. You will receive formal Notice to Proceed once your payment protection has been approved.

(Exhibit C at 159.) The contractor submitted a payment bond to satisfy the payment protection clause; it provided no other payment bond. Because the contractor provided a single payment bond under this contract, and the contractor has indicated no other basis for its reference to a payment bond prior to award, the Board concludes that the contractor’s references to a payment bond in response to the price verification request were made regarding its satisfaction of the Alternative Payment Protections clause.

8. As stated in a letter dated July 15, 2005, to the contracting officer, the contractor sought \$1,501, for the payment bond, that it maintains should not have been required. The contractor notes paragraphs 12A and 12B of the solicitation and contract that indicate that performance and payment bonds are not required (Finding of Fact (FF) 2). The letter continues:

I will agree to the presence of I.4 52.228-13 on page 30. I would like to point out that there are several paragraphs that have no bearing on this contract.

The presence of these non bearing paragraphs would le[a]d one to believe that this is a template type contract, and that there [were] two indications that a payment bond was not required. Thus a payment bond was indeed not required. This being said one would conclude that a single mistake was made of including 52.228-13 and not two mistakes of incorrectly marking 12A and 12B.

Therefore I am requesting reimbursement for the unexpected purchase of payment bond after the bid.

(Exhibit C at 167.)

9. By letter dated July 22, 2005, the contracting officer issued a decision denying the claim (Exhibit A). The decision contains the rationale for the conclusion:

The solicitation and resultant contract correctly identified that payment protection would be required and offered the Contractor a choice of providing a payment bond, a cashier's check or an irrevocable letter of credit. The Contractor chose to provide a payment bond to satisfy this requirement.

(Exhibit A at 3.)

10. By letter dated October 17, 2005, the contractor submitted its appeal to this Board (Exhibit C at 178).

DISCUSSION

The contractor claims entitlement to \$1,501 for supplying a payment bond that it maintains the Government required under the contract. The contractor has failed to demonstrate entitlement.

The contractor errs in concluding that the Government required a payment bond. Through the Alternative Payments Protection clause, the Government requires payment protection in one of three forms. The contractor opted to utilize a payment bond. There was no requirement to select that form.

The clause unambiguously identifies the requirement for payment protection. Principles of contract interpretation direct that the clause be given meaning. DRP Constr. Co., AGBCA No. 98-149-1, 99-2 BCA ¶ 30,410. The submission of the payment protection fulfilled a requirement of the contract. There is no basis to alter the fixed price of the contract when the contractor did no more than satisfy an express contract requirement.

Apart from the contract language compelling the result, there are separate bases to deny entitlement to relief. Prior to bidding and award, the contractor was aware of the requirement for payment protection as it intended to utilize a payment bond; hence, there was no ambiguity of interpretation. Aware of its intent to utilize a payment bond, the contractor wrote after bid opening and prior to award that it would contract for the agreed upon price. The contractor knew the Government's interpretation of the solicitation and contract, and opted not to withdraw its bid, instead agreeing to the contract at the fixed price. The interpretation now urged by the contractor is inconsistent with both its pre-award awareness of the requirement for payment protection and its agreement to perform at its bid price. It is disingenuous for the contractor to pursue relief without acknowledging and addressing its contemporaneous understanding and its explicit agreement to perform at its bid price.

DECISION

The Board denies the appeal.

JOSEPH A. VERGILIO

Administrative Judge

Concurring:

HOWARD A. POLLACK

Administrative Judge

Issued at Washington, D.C.

May 1, 2006